Settlement Agreement

THIS SETTLEMENT AGREEMENT ("Agreement") is made by and between the United States of America ("United States") and the State of Washington, Department of Ecology ("Ecology" or the "State"), collectively referred to herein as the "Parties."

WHEREAS, on March 4, 2003, the State of Washington filed a Complaint for Injunctive and Declaratory Relief against the United States Department of Energy ("Energy") in the United States District Court for the Eastern District of Washington (Cause No. CT-03-5018-AAM), which suit included a claim for violation of Washington's Hazardous Waste Management Act, Chapter 70.105 Revised Code of Washington (RCW);

WHEREAS, on March 10, 2003, the State issued a "Final Determination" pursuant to the Hanford Federal Facility Agreement and Consent Order ("HFFACO") in the matter of HFFACO milestone series M-91, and Hanford site transuranic and mixed transuranic wastes;

WHEREAS, on April 9, 2003, the United States filed separate Complaints against the State in the United States District Court for the Eastern District of Washington (Cause No. CT-03-5038-EFS) and in the Superior Court of Washington for Benton County (Cause No. 03-2-00722-3), challenging said Final Determination;

WHEREAS, on April 30, 2003, the State issued Administrative Order No. 03NWPKW-5494 against Energy;

WHEREAS, on or about May 29, 2003, Energy appealed said Administrative Order to the Washington Pollution Control Hearings Board (Matter No. PCHB No. 03-079);

WHEREAS, all four litigation matters described above raise issues concerning the scope of State authority over transuranic wastes;

WHEREAS, the United States believes that the State lacks the authority to impose LDR treatment requirements and LDR storage prohibitions with respect to transuranic mixed wastes, but the State believes that it has such authority;

WHEREAS, the Parties have agreed to pursue a final resolution of the State's authority to impose LDR treatment requirements and LDR storage prohibitions with respect to transuranic mixed wastes in Cause No. CT-03-5018-AAM;

WHEREAS, the Parties have agreed to a contingent schedule for treatment of transuranic mixed wastes solely as a means of narrowing the issues in dispute and to provide certainty as to how LDR treatment requirements and LDR storage prohibitions would apply following litigation of the State authority issue referenced above in the event the Department of Energy does not prevail on this issue;

WHEREAS, the Parties agree that no inference adverse to either Party's legal position is to be drawn from the Parties' agreement to provide for such a contingency;

WHEREAS, the Parties wish to resolve and settle the above-mentioned lawsuits filed by the United States on April 9, 2003, and Energy's PCHB appeal filed on May 29, 2003, and wish to litigate the transuranic mixed waste authority issue in the context of Cause No. CT-03-5018-AAM,

NOW, THEREFORE, without admission of any issues of fact or law, or waiver of any claim or defense, either factual or legal, the Parties agree as follows:

SPECIFIC PROVISIONS

1. **Milestone Series M-91 of the Hanford Federal Facility Agreement and Consent Order and the Final Determination of March 10, 2003**

A. Exhibit A to this Agreement is a Change Control Form for the M-91 milestone series of the HFFACO. Exhibit B to this Agreement is a Change Control Form for the M-16 milestone series of the HFFACO. Exhibit C to this Agreement is a Tentative Agreement to approve the Change Control Forms subject to public comment. Ecology and Energy shall approve this Tentative Agreement no later than two days after the effective date of this Agreement, and they shall request that the United States Environmental Protection Agency approve this Tentative Agreement as expeditiously as possible.

B. The Parties agree that, once approved, the Change Control Forms M-91-03-01 and M-16-03-01 in Exhibits A and B (i) will modify the M-91 and M-16 milestone series of the HFFACO, respectively, in the manner set forth in the Change Control Forms; (ii) will replace the Final Determination of March 10, 2003, in its entirety and the Final Determination will no longer have any force or effect; and (iii) will resolve all pending HFFACO disputes regarding HFFACO milestones M-91-01 and M-91-03.

C. No later than five days after both Parties approve the Change Control Forms M-91-03-01 and M-16-03-01 in Exhibits A and B, the United States shall dismiss as moot the challenges it filed to the Final Determination of March 10, 2003 (*United States v. Fitzsimmons*, CT-03-5038-RHW (E.D. Wa.); *United States v. Fitzsimmons*, 03-2-00722-3 (Sup. Ct. Benton Cty.).

BASES FOR AMENDING THE HFFACO

D. AMENDING THE HFFACO TO REFLECT COURT DECISION(S): Because, as part of this Agreement, the Parties have agreed to litigate Count 3 of the State's March 4, 2003, Complaint in *Washington v. Abraham, No.* CT-03-5018-AAM, as amended by the Complaint in the form set forth in Exhibit D to this Agreement (hereafter, the "LDR Storage and Treatment Claim"), the M-91 Change Control Form provides that certain requirements in that change package regarding treatment and storage of transuranic mixed waste will not apply until the HFFACO is amended pursuant to sub-Paragraph 1.G following a final appealable judgment on the merits of the LDR Storage and Treatment Claim in *Washington v. Abraham, No.* CT-03-5018-AAM, except as provided below in this sub-Paragraph if Energy fails to submit a proposed HFFACO amendment within a thirty (30) day period. Upon the issuance of any such final judgment and upon the issuance of any decision on appeal (including the resolution by the courts of any motions for clarification or reconsideration or petitions for rehearing), the contingent M-91 milestone series established pursuant to the Change Control Form in Exhibit A to this Agreement shall be amended, pursuant to sub-Paragraph 1.G, so that the M-91 milestone series applies on a non-contingent basis to wastes not expressly or impliedly determined by said final judgment or decision on appeal to be exempt from LDR treatment requirements and storage prohibitions by virtue of the 1996 WIPP Land Withdrawal Act Amendments and does not apply to wastes expressly or impliedly determined by said final judgment or decision on appeal to be exempt from LDR treatment requirements and storage prohibitions by virtue of the 1996 WIPP Land Withdrawal Act Amendments. For purposes of this Agreement, the final judgment or

decision on appeal expressly or impliedly determines whether a waste is exempt from LDR treatment requirements and storage prohibitions by virtue of the 1996 WIPP Land Withdrawal Act Amendments if the final judgment or decision on appeal itself, or the reasoning or principles underlying the final judgment or decision on appeal, lead to the conclusion that the waste is or is not so exempt.

Energy shall, within thirty (30) days of the issuance of any such final judgment and within thirty (30) days of the issuance of any decision on appeal (including the resolution by the courts of any motions for clarification or reconsideration or petitions for rehearing), formally request an amendment to the HFFACO to reflect the effect of the final judgment or decision on appeal on the contingent M-91 Milestone series established pursuant to the Change Control Form in Exhibit A to this Agreement. Such a request for amendment of the HFFACO pursuant to this sub-Paragraph shall be made pursuant to the process set forth in sub-Paragraph 1.G and resolved pursuant to the process set forth in sub-Paragraph 1.H. If Energy fails to submit its request to amend the HFFACO within the 30-day period, the contingent schedule in the M-91 Change Control Form in Exhibit A shall thereafter be in effect until Energy submits its request to amend the HFFACO. If a proposed amendment to the HFFACO submitted by Energy pursuant to this sub-Paragraph does not address wastes in the contingent schedule in the M-91 Change Control Form in Exhibit A, the contingent schedule for those wastes shall thereafter be in effect until Energy submits a proposed amendment to the HFFACO that addresses those wastes.

E. DESIGNATIONS OF TRANSURANIC MIXED WASTE FOR DISPOSAL AT WIPP FOLLOWING A FINAL APPEALABLE JUDGMENT: If any transuranic mixed wastes are determined by said final judgment or decision on appeal in sub-Paragraph 1.D not to be exempt from LDR treatment requirements and storage prohibitions solely because they have not been "designated by the Secretary for disposal at WIPP" within the meaning of the 1996 WIPP Land Withdrawal Act Amendments, Energy may designate such wastes for disposal at WIPP consistent with the judgment in *Washington v. Abraham*, any decision on appeal, or other applicable law and will be entitled, upon such designation, to obtain an amendment of the HFFACO to remove such wastes from the LDR treatment requirements and LDR storage prohibitions in the contingent M-91 milestone series established pursuant to the Change Control Form in Exhibit A to this Agreement. Energy may, upon such designation, formally request an amendment of the HFFACO to reflect such designation. Requests for amendment of the HFFACO pursuant to this sub-Paragraph shall be made pursuant to the process set forth in sub-Paragraph 1.G and resolved pursuant to the process set forth in sub-Paragraph 1.H.

F. HFFACO AMENDMENT REQUESTS FOR WASTES NOT EXPRESSLY OR IMPLIEDLY ADDRESSED BY COURT DECISION(S): In the event that the final judgment or decision on appeal referenced in sub-Paragraph 1.D (including the resolution by the courts of any motions for clarification or reconsideration or petitions for reconsideration) does not expressly or impliedly determine whether certain wastes are exempt from LDR treatment requirements and storage prohibitions by virtue of the 1996 WIPP Land Withdrawal Act Amendments, Energy may formally request an amendment of the HFFACO, pursuant to sub-Paragraph 1.G, on the grounds

that such wastes are "designated by the Secretary for disposal at WIPP" within the meaning of the 1996 WIPP Land Withdrawal Act Amendments, to exempt those wastes from the contingent M-91 milestone series established pursuant to the Change Control Form in Exhibit A to this Agreement. A request to amend the HFFACO made pursuant to this sub-Paragraph may be made separately from, in conjunction with, or as a part of, a request to amend the HFFACO on the bases set forth in sub-Paragraphs 1.D or 1.E. Requests for amendment of the HFFACO pursuant to this sub-Paragraph shall be made pursuant to the process set forth in sub-Paragraph 1.G and resolved pursuant to the process set forth in sub-Paragraph 1.H. In the event that the contingent M-91 milestone series established pursuant to the Change Control Form in Exhibit A to this Agreement becomes effective for wastes addressed by this sub-Paragraph 1.F, Energy shall not be precluded, whether by this Agreement (including Exhibits A and B), approval of the Change Control Forms attached to this Agreement, the submission of a HFFACO change request pursuant to sub-Paragraph 1.D incorporating those wastes on a non-contingent basis into the M-91 milestone series, Ecology's disposition of such a HFFACO change request pursuant to sub-Paragraph 1.G, or any contingent M-91 series milestones that have become effective pursuant to this Agreement, from raising as a defense to an administrative order or other enforcement action issued or brought by the State that those wastes have been "designated by the Secretary for disposal at WIPP" within the meaning of the 1996 WIPP Land Withdrawal Act Amendments and are therefore exempt from LDR treatment requirements and LDR storage prohibitions, including such requirements in the contingent M-91 milestone series established pursuant to the Change Control Form in Exhibit A to this Agreement.

PROVISIONS FOR AMENDING THE HFFACO AND DISPUTE RESOLUTION

G. PROCESS FOR AMENDMENTS TO THE HFFACO: When Energy requests an amendment of the HFFACO for reasons specified in sub-Paragraphs 1.D, 1.E, or 1.F, Energy shall submit to Ecology a signed Change Control Form pursuant to Section 12 of the HFFACO Action Plan. Energy's Change Control Form shall be limited to changes necessary to conform the M-91 milestone Series, in the manner set forth in Paragraphs 1.D, 1.E, and 1.F, to the final judgment or decision on appeal referenced in sub-Paragraphs 1.D and 1.F, or to the designation by Energy of waste for disposal at WIPP as specified in sub-Paragraph 1.E, as appropriate. Within thirty days of receipt of Energy's Change Control Form, Ecology will (1) formally approve Energy's proposal (in whole or in part); (2) issue a determination rejecting Energy's proposal (in whole or in part); and/or (3) otherwise issue a determination incorporating into the HFFACO changes necessary to conform the M-91 milestone series to the final judgment or decision on appeal, or to Energy's designation of waste for disposal at WIPP as specified in sub-Paragraph 1.D, as appropriate. Ecology's disposition of Energy's Change Control Form submitted pursuant to this sub-Paragraph shall be limited to the three actions enumerated in the preceding sentence of this sub-Paragraph. Energy may dispute Ecology's determination as set forth in sub-Paragraph 1.H. If Ecology fails to make its determination within the 30-day period, any treatment or certification requirements in the M-91 Change Control Form in Exhibit A for wastes that the Change Control Form submitted by Energy requests be exempted from those treatment or certification requirements shall not be in effect until Ecology makes its

determination. For purposes of this Agreement only, the provisions of this sub-Paragraph 1.G supersede the provisions in HFFACO Action Plan Section 12.3.3.

H. RESOLUTION OF DISPUTES REGARDING AMENDMENTS TO THE HFFACO: The determinations made by Ecology pursuant to sub-Paragraph 1.G shall be treated as final decisions or determinations pursuant to Paragraph 30.D of the HFFACO. If Energy disputes any determination made by Ecology pursuant to sub-Paragraph 1.G, Energy may appeal that determination as provided by Paragraph 30.D of the HFFACO. For any such appeal, notwithstanding any other provision of the HFFACO, the scope and standard of review of Ecology's determination shall be de novo, and no deference shall be given to either Party's arguments on appeal by virtue of Ecology's determination. No appeal brought pursuant to this sub-Paragraph 1.H shall, in and of itself, operate to delay the effective date of the requirements in the final determination or decision made pursuant to sub-Paragraph 1.G, but the Parties may agree to make equitable adjustments to those requirements during the pendency of the dispute. The provisions of this sub-Paragraph 1.H shall not have any application to any HFFACO disputes other than those set forth in sub-Paragraph 1.G. In addition, nothing in this Agreement shall be used by any Party in any other HFFACO dispute to contend that the provisions in sub-Paragraphs 1.G and 1.H have any bearing upon the proper interpretation or construction of the otherwise-applicable dispute resolution provisions of the HFFACO.

I. REQUESTS FOR STAY AND OTHER PROCEDURAL RIGHTS: Nothing in this Agreement affects either Party's right to request a stay of any final appealable judgment or decision on appeal, or either Party's right to oppose such a request. If a Party's request for a stay

of any final appealable judgment or decision on appeal is granted in whole or in part, then the contingent M-91 series milestones that have become effective as a result of the stayed portion of the judgment or decision on appeal shall likewise be stayed. In addition to seeking a stay, any Party may seek clarification of any final judgment or decision on appeal referred to in this Agreement in the form of a motion for clarification or reconsideration, a petition for reconsideration or rehearing, or other available means.

If any transuranic mixed wastes are determined by a final judgment or decision on appeal referenced in sub-Paragraph 1.D not to be exempt from LDR treatment requirements and storage prohibitions solely because they have not been "designated by the Secretary for disposal at WIPP" within the meaning of the 1996 WIPP Land Withdrawal Act Amendments, Energy may request a stay from the State or a court of competent jurisdiction of LDR treatment and storage requirements to allow Energy sufficient time to designate such waste for disposal at WIPP as set forth above in sub-Paragraph 1.E. Nothing in this Agreement shall affect the State's right to oppose such a request for a stay.

If, pursuant to sub-Paragraph 1.H, Energy disputes any determination made by Ecology pursuant to sub-Paragraph 1.G, Energy may request from the State or a court of competent jurisdiction a stay of those portions of Ecology's determination that Energy disputes.

J. Nothing in this Agreement shall be construed as precluding a Party from requesting an amendment of the M-91 milestone series pursuant to HFFACO Action Plan section 12 in order to conform the requirements for treatment or certification of transuranic mixed waste to changes in applicable law. While each Party reserves its right to oppose any such request, and

to raise as a defense that such request is barred by the doctrine of res judicata by virtue of the final non-appealable judgment in Cause No. CT-03-5018-AAM, neither party will argue that this Agreement (including Exhibits A and B), approval of the Change Control Forms attached to this Agreement, the submission of a HFFACO change request pursuant to sub-Paragraph 1.D incorporating wastes on a non-contingent basis into the M-91 milestone series, Ecology's disposition of such a HFFACO change request pursuant to sub-Paragraph 1.G, or any contingent M-91 series milestones that have become effective pursuant to this Agreement, bar the request for amendment.

2. Administrative Order No. 03NWPKW-5494, issued April 30, 2003

A. No later than two days after the effective date of the Tentative Agreement in Exhibit C, Ecology shall withdraw Administrative Order 03NWPKW-5494.

B. Upon approval of the Change Control Forms set forth as Exhibits A and B, Ecology shall not issue another administrative order or otherwise take any enforcement action addressing the subject matter of Administrative Order 03NWPKW-5494 unless and until such additional administrative order or enforcement action is within Ecology's reserved rights as set forth in Article XLVI of the HFFACO. In addition, Ecology shall not issue another administrative order or otherwise take any enforcement action regarding LDR storage and LDR treatment requirements for treatment and/or certification of transuranic mixed waste until a final appealable judgment on the merits regarding the State's authority to impose such requirements is obtained on the LDR Storage and Treatment Claim, and will not issue such an order or take such enforcement action with respect to any wastes expressly or impliedly determined by said final

judgment, or any decision on appeal from said final judgment, to be exempt from LDR treatment requirements and LDR storage prohibitions by virtue of the 1996 WIPP Land Withdrawal Act Amendments, unless said final judgment is reversed on appeal, or said decision on appeal is reversed on further appeal. If Ecology issues another administrative order or otherwise takes enforcement action addressing the subject matter of Administrative Order 03NWPKW-5494 that fails to comply with the conditions set forth in this sub-Paragraph 2.B, the Parties agree that the provisions of this sub-Paragraph 2.B are a defense to any such order or enforcement action, in addition to, and without prejudice to, any other defenses that Energy may raise to such order or enforcement action.

C. No later than five days after the State of Washington withdraws Administrative Order 03NWPKW-5494, Energy shall dismiss as moot its challenge to Administrative Order 03NWPKW-5494, filed before the Washington Pollution Control Hearings Board, *United States Department of Energy v. Washington Department of Ecology,* PCHB No. 03-079.

3. Further Proceedings in *Washington v. Abraham,* No. CT-03-5018-AAM (E.D. Wa.)

A. Upon approval of the Change Control Forms set forth as Exhibits A and B, the State will move to amend its March 4, 2003 Complaint in the form set forth in Exhibit D to this Agreement. The United States agrees to represent that it does not oppose the State's motion, while not conceding any allegation or claim set forth in the State's Amended Complaint.

B. Within four (4) months of the effective date of this Agreement, the State shall file its motion for summary judgment on the LDR Storage and Treatment Claim. Within thirty (30) days of filing of the State's motion for summary judgment, the United States shall file its cross-

motion for summary judgment and response to the State's motion for summary judgment on the LDR Storage and Treatment Claim. Within thirty (30) days of filing of the United States' initial filing, the State shall file its consolidated response to the United States' summary judgment motion and reply in support of the State's summary judgment motion regarding the LDR Storage and Treatment Claim. Within twenty-one (21) days of filing of the State's consolidated response and reply regarding the LDR Storage and Treatment Claim, the United States shall file its reply in support of its motion for summary judgment on that claim. In the event that the State seeks leave of the court to file a sur-reply, the United States agrees to represent that it does not oppose the State's motion. The schedule set forth in this sub-Paragraph 3.B is subject to the approval of, and to modification by, the court.

GENERAL PROVISIONS

4. Nothing in this Agreement, including the M-91 and M-16 Change Control Forms attached to this Agreement, constitutes an admission, acknowledgment, or inference of any kind regarding the merits of the LDR Storage and Treatment Claim. Nothing in this Agreement shall constitute an admission or evidence of any fact, wrongdoing, misconduct, or liability on the part of the United States or Ecology, including their officers or any person affiliated with them. The provisions, terms and conditions of this Agreement shall not be admissible in any action as an adjudication, finding or admission of any issue of fact or law, except in an action to enforce this Agreement. Notwithstanding the foregoing provisions of this Paragraph, this Agreement shall be admissible in any forum to establish that the Parties have agreed to take the actions contained herein.

5. No provision of this Agreement shall be interpreted as or constitute a commitment or requirement that Energy obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or take any actions in contravention of any other substantive or procedural law or regulation. Nor shall any provision of this Agreement be interpreted as an agreement by the State that the Anti-Deficiency Act constitutes a valid defense to compliance with the requirements of this Agreement.

6. Except as set forth in this Agreement, all Parties reserve and do not waive any and all other legal rights and remedies.

7. This Agreement constitutes the final, complete and exclusive agreement and understanding between the Parties with respect to the matters addressed in this Agreement. There are no representations, agreements or understandings relating to this settlement other than those expressly contained in this Agreement. All prior conversations, meetings, discussions, drafts and writings of any kind are specifically superseded by this Agreement and may not be used by the Parties to vary or contest the terms of this Agreement.

8. The Parties may agree in writing to modify any provision of this Agreement.

9. This Agreement may be executed in one or more counterparts, each of which will be an original, and such counterparts shall together constitute one and the same Agreement.

10. Nothing in this Agreement is intended to establish rights in persons or entities not executing this Agreement.

11. Each Party shall bear its own costs, including attorneys' fees, incurred in relation to the Administrative Order 03NWPKW-5494, the Final Determination of March 10, 2003, and the legal proceedings referenced above relating to the Administrative Order and Final

Determination, including attorneys' fees and costs associated with monitoring, overseeing, or implementing this Agreement.

12. Each of the undersigned representatives hereby certifies that he or she is fully authorized to enter into this Agreement, and to legally bind each respective Party to this Agreement. This Agreement will be deemed to be executed and shall become effective when it has been signed by all of the representatives of the Parties set forth below.

13. If, as a result of public comments received during the period described in the Tentative Agreement attached as Exhibit C, the Parties do not sign and approve both Change Control Forms M-91-03-01 and M-16-03-01, then this Settlement Agreement shall be null and void in its entirety. If either or both of the Change Control Forms M-91-03-01 or M-16-03-01 are modified following public comment and approved by the Parties, then all references in this Agreement to the Change Control Forms M-91-03-01 and M-16-03-01 attached as Exhibits A and B shall be treated as references to Change Control Forms M-91-03-01 and M-16-03-01 as modified and approved by the Parties.

DATED: 10/23/03

Linda Hoffman
Acting Director
Washington State Department of Ecology
P.O. Box 47600
Olympia, WA 98504-4600

DATED: 10/23/03

Joseph E. Shorin, III
Assistant Attorney General
P.O. Box 40117
Olympia, WA 98504-0117

DATED: October 23, 2003

Jessie Roberson
Assistant Secretary of Energy
for Environment Management
United States Department of Energy
1000 Independence Avenue, S.W.
Washington, D.C. 20585

Thomas L. Sansonetti
Assistant Attorney General
Environment & Natural Resources Division

DATED: _____

Michael J. Zevenbergen
Senior Counsel
United States Department of Justice
c/o NOAA/Damage Assessment
7600 Sand Point Way, NE
Seattle, WA 98115

DATED: _____

Jessie Roberson
Assistant Secretary of Energy
for Environment Management
United States Department of Energy
1000 Independence Avenue, S.W.
Washington, D.C. 20585

Thomas L. Sansonetti
Assistant Attorney General
Environment & Natural Resources Division

DATED: October 23, 2003

Michael J. Zevenbergen
Senior Counsel
United States Department of Justice
c/o NOAA/Damage Assessment
7600 Sand Point Way, NE
Seattle, WA 98115